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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court is reported at 146 F. Supp. 63; that of the Court of Appeals at 239 F. 2d 177.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1956 (R. 18). The petition for certiorari was filed on December 29, 1956, and granted on January 28, 1957 (R. 19). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

Internal Revenue Code of 1939

§ 145. Penalties

* * * * *

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

§ 3616. Penalties

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

QUESTION PRESENTED

Whether a defendant convicted of having wilfully attempted to defeat and evade the income tax by filing a false and fraudulent income tax return may be sentenced under § 145 (b) of the Internal Revenue Code of 1939, rather than under § 3616 (a) of that Code.

STATEMENT

An indictment in four counts was returned against petitioner in the United States District Court for the Southern District of New York (R. 2-4). Count One of this indictment charged that petitioner "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 by filing and causing to be filed . . . a false and fraudulent income tax return . . ." The second, third, and fourth counts contained similar charges for 1947, 1948, and 1949.[1] Each of these counts cited 26 U.S.C. § 145 (b) as the statute which petitioner was alleged to have violated.

The jury acquitted petitioner under the first count and convicted him under the remaining three counts (R. 1). He was sentenced to serve five years imprisonment on each count, the sentences to run concurrently, and was also fined $10,000.00 on each count (R. 1). The United States Court of Appeals for the Second Circuit reversed his conviction under the second count on the ground that the evidence was insufficient to sustain a guilty verdict, but affirmed as to the third and fourth counts (R. 1). 221 F. 2d 668. This Court, limiting its review to the validity of an indictment based solely upon hearsay evidence, affirmed the judgment of the Court of Appeals (R. 1). 350 U.S. 359.

On May 15, 1956, petitioner filed a motion in the District Court for correction of his sentence under 28 U.S.C. § 2255 and Rule 35 of the Federal Rules of

[1] These counts differed from the first count in that they charged the filing of a false joint income tax return, whereas the first count charged the filing of a false individual return.

Criminal Procedure (R. 4). He alleged that § 3616 (a) of the Internal Revenue Code of 1939 controlled the sentence for the offenses with which he was charged, and that the maximum sentence which could lawfully have been imposed upon him was imprisonment for one year and a fine of $1,000.00 under each count.

On August 21, 1956, the District Court denied this motion upon the authority of *United States* v. *Moran*, 236 F. 2d 361, certiorari denied, 352 U.S. 909 (R. 15-17). On December 12, 1956, the United States Court of Appeals for the Second Circuit affirmed *per curiam* upon the authority of this same case (R. 17).

SUMMARY OF ARGUMENT

Petitioner has been convicted of attempting to defeat and evade his income taxes by filing false returns. This offense is a felony under § 145 (b) of the Internal Revenue Code of 1939 and a misdemeanor under § 3616 (a) of the same Code. It is conceded that both statutes require precisely the same proof in a case of this character, and hence that petitioner could not constitutionally be subjected to cumulative sentences under both of them for a single act of evasion.

The government contends that it may constitutionally elect to prosecute one offender under the felony statute and another offender under the misdemeanor statute, despite the identity of their offenses. Such power, however, would involve a flagrant denial of equal protection and, under these circumstances, a denial of due process under the Fifth Amendment. Moreover, it would involve an unlawful delegation of legislative power, since Congress is charged with the responsibility of determining whether a given offense

shall constitute a felony or a misdemeanor. The remedy is to permit prosecution only under the misdemeanor statute, in accordance with the established principle that penal statutes must be strictly construed not only as to the conduct prohibited but also as to the penalty imposed.

A second solution is to invoke the axiomatic rule that a "special" statute will always be applied in preference to a "general" statute covering the same subject. Here § 145 (b) is a "general" statute, interdicting attempts to evade taxes *in any manner*, while § 3616 (a) is a "special" statute, interdicting attempts to evade taxes *by filing a false return*.

The maximum term of imprisonment under § 3616 (a) is one year, since it is a misdemeanor statute. Petitioner, however, was given concurrent five year terms under both counts of the indictment. His sentence should consequently be corrected by substituting concurrent one year terms. Since he has already served one year of concurrent time under the original sentence, he cannot now be given consecutive sentences under the two counts. The double jeopardy clause, as interpreted by this Court, prohibits the imposition of consecutive sentences after a defendant has fully executed concurrent sentences for the same offenses.

ARGUMENT

I

Petitioner's Sentence Constitutes a Denial of Due Process and an Unconstitutional Delegation of Legislative Power

Petitioner has been indicted, tried, convicted, sentenced, and imprisoned for attempting to defeat and evade his income taxes by filing false income tax returns. It is conceded that this offense is prohibited

by both § 145 (b) and § 3616 (a) of the Internal Revenue Code of 1939.[2] It is further conceded that, in this instance, both sections cover precisely the same ground. The proof sufficient to sustain conviction under one is of necessity sufficient to sustain conviction under the other. Neither requires proof of an element not required by the other.

This conclusion is compelled by both reason and authority. Section 145 (b) makes it a felony to attempt to evade or defeat the income tax by filing a false return. Section 3616 (a) makes it a misdemeanor to file a false return for the purpose of defeating or evading the income tax. If there is a distinction between the acts outlawed by these two statutes, it

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[2] The government's memorandum in response to the petition for certiorari herein so concedes at p. 2, and this Court so assumed, although *arguendo*, in *Berra* v. *United States*, 351 U.S. 131. The relevant authorities are summarized in the government's brief in *Berra*, which states at p. 24, n. 9:

> "We agree with petitioner, contrary to the court below (see *Dillon* v. *United States*, 218 F.2d 97, 103), that Section 3616 (a) applies to income tax violations. We think that its unqualified terms, the enactment of the predecessor of Section 3616 (a) in 1864 as part of a Revenue Act which included an income tax (Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285), and its collocation in the Internal Revenue Code of 1939, all point to its applicability to false income tax returns. This construction has been tacitly sustained in a number of cases. *Ex parte Cohen*, 191 F.2d 300 (C.A. 9), certiorari denied, 342 U.S. 947; *Taylor* v. *United States*, 179 F.2d 640, 643-644 (C.A. 9); *Kirsch* v. *United States*, 174 F.2d 595, 597-598 (C.A. 8); *Slick* v. *United States*, 1 F.2d 897 (C.A. 7); *Ex parte Berkoff*, 65 F.Supp. 976, 979-981 (D.Minn.); *United States* v. *Koppelman*, 61 F.Supp. 1007, 1008-1009 (M.D.Pa.); *United States* v. *Benz*, 24 Fed. Cas. No. 14, 576 (N.D.Ill.); see also 10 Mertens, *Law of Federal Income Taxation*, Sec. 55.66."

is a distinction without a difference. Common sense decrees that the prohibitions are coterminous.

This Court has expressly so held in *Berra* v. *United States*, 351 U.S. 131. There petitioner was indicted under § 145 (b) for attempting to evade and defeat his income tax by filing a false return. He contended that the jury should have been instructed on the "lesser included offense" delineated by § 3616 (a). This Court rejected his contention, on the ground that the proof necessary to support conviction under § 3616 (a) was precisely the same as the proof necessary to support conviction under § 145 (b), and there was hence no factual issue for determination by the jury.[3] Mr. Justice Harlan, speaking for the majority, pointed out, 351 U.S. at 134:

> "For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return (§ 145 (b)) were identical with those required to prove that he delivered a false return with 'intent' to evade taxes (§ 3616 (a)). In this instance §§ 145 (b) and 3616 (a) covered precisely the same ground."

Consequently, it is manifest that the double jeopardy clause would prohibit cumulative sentences under both of these sections for the same act of evasion. The law has long been settled that a single course of conduct may be punished under multiple statutes only where each offense requires proof of some element

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[3] The *Berra* opinion, however, expressly reserved the question presented by this case, namely, the validity of a sentence in excess of the maximum penalty under § 3616 (a). 351 U.S. at 135.

not essential to the others.[4] Here, as this Court has already recognized, the proof required under both statutes is precisely the same, and hence this petitioner could not constitutionally be subjected to cumulative sentences for a single false return. Indeed, the government's brief in *Berra* so concedes (p. 30, n. 13):

> "There is no question of double jeopardy here, since the Government has not attempted to prosecute petitioner under both statutes. If it had so attempted, the question would depend on whether each offense 'requires the proof of a fact not essential to the other.' *Pereira* v. *United States*, 347 U.S. 1, 9, and cases cited. We think it clear that under that test the Government could not prosecute petitioner under both Section 145 (b) and Section 3616 (a) for filing a false income tax return with intent to evade the tax."

Since petitioner cannot be punished under both of these statutes, it follows that he must be punished under one or the other alone. The United States claims that it can select the applicable statute. If it elects to obtain an information charging that the defendant filed a false return with intent to defeat and evade his income tax, it contends that his punishment is controlled by § 3616 (a); if it elects to obtain an indictment charging that he attempted to evade and defeat his income tax by filing a false return, it contends that his punishment is controlled by § 145 (b). The offense is the same, but the penalties are radically dis-

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[4] *Pereira* v. *United States*, 347 U.S. 1; *Rosenberg* v. *United States*, 346 U.S. 273 (opinion of Mr. Justice Clark); *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *Blockburger* v. *United States*, 284 U.S. 299; *United States* v. *Noveck*, 273 U.S. 202; *Albrecht* v. *United States*, 273 U.S. 1; *Morgan* v. *Devine*, 237 U.S. 632; *Gavieres* v. *United States*, 220 U.S. 338.

parate. In one case, the maximum penalty will be one year in prison and a fine of $1,000.00, while in the other case the maximum penalty will be five years in prison and a fine of $10,000.00. This disparity becomes even more striking where, as here, there are multiple counts. If petitioner had been convicted under all four counts of the indictment returned against him, he could have been imprisoned for *twenty years;* but if the prosecuting attorney had elected to file an information instead of an indictment, petitioner could not have been imprisoned for more than *four years.*

The Internal Revenue Code contains no criteria to guide a prosecuting attorney in making this election. The result is that different cases are governed by different prosecutors' conceptions of what "ought" to be a felony and what "ought" to be a misdemeanor. The government's brief in *Berra* contains this candid confession on the point (pp. 23-24, n. 9):[5]

> "... Section 3616 (a) has frequently been utilized by the Government in the prosecution of income tax cases in which the evidence of wilful evasion, though technically adequate to warrant the institution of proceedings under Section 145 (b), shows an offense of such *minor importance* as to justify the choice of a misdemeanor charge instead of felony. In numerous cases, for example, individual taxpayers evade *very small portions* of their income taxes by claiming false dependents in their returns." (Emphasis added.)

Of course, the Internal Revenue Code affords no standard for determining when an offense is of "minor

[5] To the same effect, see the government's brief in opposition to certiorari in *Dillon* v. *United States*, 218 F.2d 97, certiorari dismissed, 350 U.S. 906, at p. 8.

importance" or what sums constitute "very small portions" of the tax due. Nor is there any reason to suppose that the United States Attorney for the Southern District of New York, who prosecuted this case, would agree with the United States Attorney for the Southern District of California concerning the practical application of these terms. The result is that one defendant will be convicted of a felony, while another defendant will be convicted of a misdemeanor, for committing precisely the same offense under precisely the same circumstances.

It is clear that no state could confide such discretion to its prosecuting arm. The equal protection clause of the Fourteenth Amendment concededly invalidates any statute or statutory scheme whereby different offenders are exposed to different penalties for committing the same offense under the same circumstances. This Court has squarely held that different penalties may be imposed for the same offense only where the statute creates a reasonable classification of offenders and deals out the severe penalty to all who are similarly situated. *Pennsylvania* v. *Ashe*, 302 U.S. 51; *Graham* v. *West Virginia*, 224 U.S. 616; *Finley* v. *California*, 222 U.S. 28; *McDonald* v. *Massachusetts*, 180 U.S. 311; *Moore* v. *Missouri*, 159 U.S. 673. And where the statutory classification is unreasonable or arbitrary, having no relationship to a legitimate governmental objective, the statute is unconstitutional. *Skinner* v. *Oklahoma*, 316 U.S. 535.

Here the statutes contain no criterion, reasonable or otherwise, for the classification of offenders. The classification rests in the prosecutor's discretion, which may or may not operate unreasonably and arbitrarily.

The Supreme Courts of Oregon and Washington have recently held unconstitutional state statutes which expressly attempted to give a prosecutor such discretion. *State* v. *Cory*, 204 Or. 235, 282 P. 2d 1054; *State* v. *Pirkey*, 203 Or. 697, 281 P. 2d 698; *Olsen* v. *Delmore*, —— Wash. 2d ——, 295 P. 2d 324. In the *Pirkey* case, 203 Or. at 706-707, 281 P. 2d at 702-703, the court stated:

> "It would be monstrous to uphold and enforce a statute which authorized a grand jury or magistrate to determine finally whether an accused should receive a fine or a jail sentence, on the one hand, or a penitentiary sentence, on the other, and to make that decision before trial, without having heard any evidence for the defendant, either on the issue of guilt or of mitigation, and on the sole basis of a prima facie case made against one still presumed to be innocent. . . . We see in this statute no provision whereby one charged with a misdemeanor could be sentenced as for a felony, however heinous the offense might after trial appear to have been. Again, if the defendant is proceeded against as for and convicted of a felony, there is no provision authorizing the court in its informed discretion to impose punishment as for a misdemeanor, however strong the evidence in mitigation might be. In our opinion, such a statute so construed would not only violate the Equal Protection Clause and constitute an unauthorized delegation of discretionary power, but it would constitute an invalid encroachment upon the function of the courts whose prerogative and duty it is to determine, not only guilt, but punishment, upon judicial inquiry, after public trial and within the maximum and minimum limits prescribed by the legislature."

Certainly this Court should not permit a federal prosecutor to exercise discretion which no state prose-

cutor could constitutionally exercise. It has often been held that the first nine amendments to the Constitution impose upon the federal government restrictions more stringent than those which the Fourteenth Amendment imposes upon the states, but it has never been suggested that the Fourteenth Amendment constitutes a greater safeguard for individual liberty than the Bill of Rights. Even the government will scarcely urge that it should be permitted to make arbitrary discriminations in the enforcement of federal criminal statutes which are forbidden to the states in the enforcement of their criminal statutes.

Squarely in point is the case of *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500, where this Court said:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.
>
> * * * * *
>
> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

Petitioner's position on this issue finds strong support in the opinion of Mr. Justice Black, dissenting, in *Berra*, 351 U.S. at 140:

> "The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice."

This arbitrary authority to invoke either felony or misdemeanor provisions not only amounts to a denial of equal protection; it also involves an invalid delegation of legislative power. The law is settled that Congress has the responsibility for defining felonies and misdemeanors.[6] When it enacts two statutes punishing identical conduct as both a felony and a misdemeanor, with no criteria to guide the executive in determining which statute shall be applied in any given case, it has abdicated this important function to the executive. Whatever may be the result when Congress attempts a delegation of legislative power with some statutory standards to guide the executive in its exercise, the authorities are clear that no such delegation can be valid absent any statutory standards whatsoever.[7]

Mr. Justice Black recognized this second constitutional infirmity of the government's position in his *Berra* dissent, 351 U.S. at 139-140:

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[6] Cf. *Stewart & Bro., Inc.* v. *Bowles*, 322 U.S. 398, 404.

[7] *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388.

> "The Government's whole argument rests on the stark premise that Congress has left to the district attorney or the Attorney General the power to say whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.
>
> "A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. . . .
>
> "A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions."

Under the foregoing authorities, it is plain that federal prosecutors cannot constitutionally elect to prosecute identical offenses under different statutes penalizing the same conduct with radically disparate sanctions. Two possible solutions have been suggested. The first is that both statutes are void because of a fatal ambiguity in the applicable penalty.[8] The second is that only the statute imposing the lesser penalty may be applied.

The latter solution appears more consonant with public policy and with the legislative intent. It is in accordance with the well settled canon that penal statutes must be strictly construed, not only as to the conduct proscribed but also as to the penalty imposed.

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[8] Cf. brief of Poncet Davis as *amicus curiae* in support of the petition for certiorari in the case at bar, pp. 8-11.

A leading case in point is *Bell* v. *United States*, 349 U.S. 81, 83, where this Court stated:

> "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

Similar conclusions were reached in *Prince* v. *United States*, 352 U.S. ——, and *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218.

The rationale of these cases compels imposition of the lesser penalty in cases falling within the overlapping ambits of both felony and misdemeanor statutes. Only in this way can the courts avoid an unconstitutional discrimination between offenders who have committed identical crimes under identical circumstances.

II

Section 3616 (a) Is a Specific Statute Dealing With False Tax Returns and Prevails Over Section 145 (b), Which Is a General Statute Dealing With Tax Evasion by Any Means

It is axiomatic that a general statutory provision is never applied where there is a specific statutory provision dealing with the same subject. In the early case of *United States* v. *Chase*, 135 U.S. 255, 260, Mr. Justice Lamar stated:

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' . . . This rule applies wherever an

> act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include."

The same principle was again enunciated by this Court in *Kepner* v. *United States*, 195 U.S. 100, 125, where Mr. Justice Day stated:

> "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."

Similar language may be found in *MacEvoy* v. *United States*, 322 U.S. 102, 107; *Missouri* v. *Ross*, 299 U.S. 72, 76; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208.

This principle was applied to overlapping penal statutes in *Robinson* v. *United States*, 142 F. 2d 431. There the Eighth Circuit upheld defendant's contention that he was improperly sentenced under a section of the penal code which imposed a maximum penalty of imprisonment for ten years, whereas he should have been sentenced under another section which imposed a maximum penalty of imprisonment for three years. The court pointed out, 142 F. 2d at 432:

> "[A]lthough the larceny of any property of the United States in general may be punished by ten years imprisonment, it is forbidden to impose more than three years for larceny of that particular United States property which belongs to the Post Office Department. Elementally, the special stands against the general. That is, where there is a law against any stealing, and another and different law against stealing some particular thing, the two laws do not invalidate each other by conflict, but the courts treat the law against

> stealing the particular thing as presenting an exception to the law against stealing things in general. They enforce the exception."

In the case at bar, it is clear that § 145 (b) is the "general" statute and § 3616 (a) the "specific" statute. Section 145 (b) prohibits any attempt to evade or defeat the payment of income taxes *in any manner*, whereas § 3616 (a) prohibits any attempt to defeat or evade the payment of income taxes *by filing a false return*. Of course, § 145 (b) as such applies only to income taxes, while § 3616 (a) applies to all f deral taxes. The precise language of § 145 (b) is repeated in numerous other sections of the 1939 Code, however, which cover virtually all of the major taxes imposed thereby. Similarly worded sections make it a felony to attempt in any manner to evade or defeat the estate tax,[9] the gift tax,[10] the admissions and dues tax,[11] the documents tax,[12] the narcotics tax,[13] and the firearms tax.[14] Thus § 145 (b) is in effect a "general" statute, applicable alike to all of the major taxes imposed by the 1939 Code.

This conclusion is reinforced by the Internal Revenue Code of 1954. The 1954 Code replaces all of the sections similar to § 145 (b) with a single section, which makes it a felony to attempt in any manner to evade or defeat "any tax imposed by this title."[15]

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[9] Internal Revenue Code of 1939, § 894 (b) (2) (C).
[10] Internal Revenue Code of 1939, § 1024 (b).
[11] Internal Revenue Code of 1939, § 1718 (b).
[12] Internal Revenue Code of 1939, § 1821 (a) (2).
[13] Internal Revenue Code of 1939, § 2557 (b) (3).
[14] Internal Revenue Code of 1939, § 2707 (c).
[15] Internal Revenue Code of 1954, § 7201.

This Code also revised § 3616 (a) to eliminate the necessity for an intent to defeat or evade payment of the tax,[16] so that the question presented by this case cannot arise under present law. Assuming for the purpose of illustration, however, that Congress had carried forward § 3616 (a) without amendment, it is too clear for dispute that the successor to § 145 (b) and its companion sections would be a "general" statute, while § 3616 (a) would be a "special" statute. Under this hypothetical state of the law, one section of the Code would outlaw any attempt to evade or defeat any tax *in any manner*, while another section of the same Code would outlaw any attempt to defeat or evade any tax *by filing a false return*.

The foregoing hypothesis differs from the situation presented by the case at bar only in that the Internal Revenue Code of 1939 contained multiple sections, each outlawing in identical language any attempt to evade or defeat a certain tax in any manner. The prohibition was repeated for each major tax imposed by the Code, instead of appearing only once as it does in the 1954 Code. This difference, however, is plainly a difference of draftsmanship, and not of substance. The decision of the case at bar should not be made to turn upon such niceties. The result should be the same as if the 1939 Code, like the 1954 Code, had enunciated but once the general prohibition against attempting to evade or defeat the payment of any tax in any manner. Section 145 (b) and its companion sections must be regarded as what they in fact are, namely, multiple pronouncements of a single statutory command.

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[16] Internal Revenue Code of 1954, § 7207.

Viewed in this perspective, § 145 (b) is a "general" statute and § 3616 (a) is a "special" statute within the meaning of the foregoing authorities. The situation is indistinguishable from that presented to the Eighth Circuit in *Robinson*, and the outcome must be the same unless this Court is prepared to repudiate a doctrine which it has hitherto regarded as axiomatic.

This canon of statutory construction compels especial respect where, as here, its application will avoid serious constitutional questions. It is settled that this Court will, wherever possible, construe a statute so as to avoid serious question as to its constitutionality. *Peters* v. *Hobby*, 349 U.S. 331; *United States* v. *Rumely*, 345 U.S. 41. In this case, there are grave issues involving the scope of the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment. These issues may be completely avoided by applying the axiomatic principle that a special statute will always be applied in preference to a general statute embracing the same subject matter. The constitutional effect of overlapping statutes which punish identical conduct as both a felony and a misdemeanor may then await disposition in a case amenable to no other resolution.

III

The Proper Relief in This Case Is Correction of Petitioner's Sentence to Impose Imprisonment for One Year and a Fine of $1,000.00 Under Each Count of the Indictment, the Terms of Imprisonment to Run Concurrently and Not Consecutively

The maximum sentence which could have been lawfully imposed upon petitioner was imprisonment for one year and a fine of $1,000.00 under each count of the indictment. He was in fact sentenced to imprison-

ment for five years and a fine of $10,000.00 under each count, the terms of imprisonment to run concurrently. It is conceded that he has already served more than one year of imprisonment under this sentence.[17]

The authorities are unanimous that a sentence in excess of the statutory maximum is void only as to such excess.[18] The sentence in this case was therefore valid insofar as it imposed concurrent terms of imprisonment up to one year. Petitioner has fully executed this valid portion of the sentence. Consequently, he cannot constitutionally be subjected to further punishment.

This result is compelled by the landmark case of *Ex parte Lange*, 18 Wall. 163. There petitioner was sentenced to imprisonment for one year *and* fined $200.00 under a statute permitting imprisonment for one year *or* a fine of $200.00. After petitioner had paid the fine and served five days of his prison sentence, he brought a writ of habeas corpus. The trial court vacated his sentence and imposed a new sentence of imprisonment for one year. This Court reversed, holding that the double jeopardy clause prohibits further punishment after a defendant has fully executed the valid portion of his initial sentence. The opinion states, 18 Wall. at 176:

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[17] Petitioner served thirty-five days of this sentence in 1954, prior to his enlargement upon bail by Mr. Justice Jackson. 99 L.Ed. 1291. He was again imprisoned under this sentence on May 14, 1956 (R. 10). It is conceded that he has been credited with statutory allowances for good time pursuant to 18 U.S.C. § 4161.

[18] *United States* v. *Pridgeon*, 153 U.S. 48; *McKinney* v. *Finletter*, 205 F.2d 761; *Wilson* v. *Bell*, 137 F.2d 716; *Dimenza* v. *Johnston*, 131 F.2d 47; *Spirou* v. *United States*, 24 F.2d 796, certiorari denied, 277 U.S. 596.

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offence. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for the offence was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

The rule of the *Lange* case was reaffirmed in *United States* v. *Benz*, 282 U.S. 304, 307, where this Court stated:

"The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'"

To the same effect is the case of *In re Bradley*, 318 U.S. 50, 52. There, as in *Lange*, petitioner was sentenced to imprisonment *and* fined under a statute permitting imprisonment *or* a fine. He commenced service of his term of imprisonment on September 28 and paid his fine on October 1. A few hours after he paid the fine, the court realized its mistake and sought to amend the sentence by remitting the fine and retaining only the term of imprisonment. This Court reversed, holding that the attempted amendment of petitioner's sentence was a nullity.

> "When, on October 1, the fine was paid to the clerk and receipted for by him, the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end. . . .
>
> "It follows that the subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity. Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint."

The *Lange* rule has been repeatedly applied by the federal courts of appeals. See *United States* v. *Rosenstreich*, 204 F. 2d 321; *Wilson* v. *Bell*, 137 F. 2d 716; *Frankel* v. *United States*, 131 F. 2d 756. Cf. *Oxman* v. *United States*, 148 F. 2d 750, certiorari denied, 325 U.S. 887.

It is true that the trial court might lawfully have imposed consecutive terms of imprisonment for one year under each count, resulting in an aggregate term of two years. The fact remains, however, that the

sentences actually imposed and served were concurrent. It is hornbook law that a prisoner serving concurrent sentences each day serves a portion of every such sentence. This petitioner, therefore, has already served one year under each count of the indictment. Neither the sentencing court nor any other court can retroactively convert this service into one year under one count of the indictment.

The federal courts have frequently applied the *Lange* rule where there has been an attempt to transform concurrent sentences into consecutive sentences. See *United States* v. *Chiarella*, 214 F. 2d 838, certiorari denied, 348 U.S. 902; *Ekberg* v. *United States*, 167 F. 2d 380; *Rutledge* v. *United States*, 146 F. 2d 199. In all three of these cases, the courts held that consecutive sentences could not be substituted for concurrent sentences once the defendant had commenced serving his term of imprisonment.[19]

Any other conclusion would have completely unjust consequences in cases of this character. Here, of course, petitioner was originally given concurrent five year terms under two counts, which would result in a longer period of imprisonment than consecutive one year terms under these two counts. In many cases, however, the concurrent terms imposed under § 145 (b) would result in a shorter period of imprisonment than consecutive one year terms under § 3616 (a). In the case of *United States* v. *Moran*, *supra*, for example,

[19] In the *Chiarella* case, the consecutive sentences sought to be imposed would have resulted in a shorter aggregate term of imprisonment than the sentences initially imposed, while in the *Ekberg* case, the consecutive sentences would have resulted in the same aggregate term of imprisonment as the sentences initially imposed. This factor, however, was not regarded as removing the cases from the *Lange* rule. Cf. *Wilson* v. *Bell*, 137 F.2d 716.

defendant was given concurrent two year terms under three counts of an indictment charging violations of § 145 (b). It would be both absurd and unjust to suggest that he might be penalized for moving to correct his sentence by substituting consecutive one year terms under these three counts, resulting in an aggregate term of imprisonment one year longer than his original "excessive" sentence.[20]

The foregoing authorities lead irresistibly to the conclusion that it is now too late to impose consecutive terms of imprisonment upon this petitioner. His sentence is void only insofar as it is in excess of the maximum penalty permissible under § 3616 (a). It should be corrected by eliminating such excess, that is, by reducing the term of imprisonment under each count from five years to one year and the fine under each count from $10,000.00 to $1,000.00. It cannot constitutionally be altered in any other respect, because petitioner has fully executed a valid portion thereof.

CONCLUSION

For the foregoing reasons, petitioner urges that the judgment of the court below should be reversed and the case remanded, with directions to correct petitioner's sentence. The sentence, as corrected, should impose imprisonment for one year and a fine of $1,000.00 under Count Three and imprisonment for one year

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[20] See also *United States* v. *H.J.K. Theatre Corp.*, 236 F.2d 502, certiorari denied *sub nomine Ansell* v. *United States*, 352 U.S. 969; *United States* v. *Achilli*, 234 F.2d 797, certiorari granted, 352 U.S. —. In both of these cases, the concurrent terms of imprisonment actually imposed under § 145 (b) resulted in a shorter aggregate sentence than if the defendant had been given consecutive terms under § 3616 (a).

and a fine of $1,000.00 under Count Four, the terms of imprisonment to run concurrently.

Respectfully submitted,

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